MOTION FILED
DEC - 1 2003

No. 02-1624

IN THE

Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT,
DAVID W. GORDON,
Petitioners,

v.

MICHAEL A. NEWDOW,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE*, UNITED STATES CONGRESS MEMBER RON PAUL, CALIFORNIA STATE ASSEMBLY MEMBER RAY HAYNES, GILBERT ARMIJO, NATIONAL LAWYERS ASSOCIATION, TRADITIONAL VALUES COALITION, TRADITIONAL VALUES COALITION EDUCATION & LEGAL INSTITUTE, CAMPAIGN FOR CALIFORNIA FAMILIES, PASTORS INFORMATION RESOURCE COUNCIL, THE PRO-FAMILY LAW CENTER, WEST COVINA UNIFIED SCHOOL DISTRICT, THE LOUISIANA FAMILY FORUM, CATHY FITZGERALD, DANIEL S. HAHN, LAWRENCE SPICHER, MARK COOPER, NATISHA COOPER, LANA LOZA, JANICE WALKER, EVELYN BRADLEY, MARJORIE SILVEIRA, IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI.

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This motion is made pursuant to Supreme Court Rule 37.2(b). Written consent from the other parties has not been obtained for the filing of this *amicus* brief. Filing of this brief will be helpful to the court as *Amicus Curiae* is familiar with the issues in this case and represents a number of elected officials and organizations representing well over 1,000,000 residents of this country.

INTERESTS OF AMICI CURIAE

UNITED STATES CONGRESS MEMBER RON PAUL (R) is a member of the United States Congress. As such, he represents the interests of approximately 650,000 United States citizens.

CALIFORNIA STATE ASSEMBLY MEMBER RAY HAYNES is a member of the California State Assembly 66th

Assembly District, and represents the interests of more than 425,000 Californians.

GILBERT ARMIJO is a member of the Santa Maria Planning Commission and a member of the Knights of Columbus Council No. 2475. MR. ARMIJO is personally interested, as a local official and citizen, in being able to publicly and freely express his patriotic and religious beliefs.

NATIONAL LAWYERS ASSOCIATION is a 501(c)(6) professional trade association dedicated to the principle that the Founding Fathers of the government of the United States of America established a governmental structure for the Nation consisting of the Declaration of Independence and the Constitution; that the Constitution is to be interpreted in the light of the principles and transcendent truths set forth in the Declaration of Independence; and that the legal community has a special responsibility to preserve and protect that structure.

TRADITIONAL VALUES COALITION is the largest non-denominational, grassroots church lobby in America representing churches and individuals. TVC has been present at the U.S. Congress for over 20 years advocating for pro-family issues including the right to the free exercise of religious liberties. TVC's membership of over 43,000 churches bridges racial and socio-economic barriers and includes most Christian denominations.

TRADITIONAL VALUES COALITION EDUCATION & LEGAL INSTITUTE is a non-profit foundation dedicated to educating and assisting churches and individuals in their efforts to restore America's Judeo-Christian cultural heritage and their right to the free exercise of their faith. TVCELI makes information and analysis available on public policy and current cultural issues.

CAMPAIGN FOR CALIFORNIA FAMILIES is a non-profit, nonpartisan, family defense and lobbying organization serving families in the State of California and across the nation. CCF promotes the innate worth of all individuals, but advocates against behavioral choices that are detrimental to society, family, and the general welfare of the individual states and nation as a whole.

PASTORS INFORMATION RESOURCE COUNCIL is a nonprofit organization dedicated to the education of churches, their members, and the general public on issues of religious freedom. PIRC is based in the City of Highland, San Bernardino County, California.

THE PRO-FAMILY LAW CENTER is a division of Abiding Truth Ministries, a non-profit corporation, dedicated to protecting churches and individuals' First Amendment rights and advocating for pro-family issues.

WEST COVINA UNIFIED SCHOOL DISTRICT is a school district established pursuant to the laws of the State of California located in West Covina, California.

THE LOUISIANA FAMILY FORUM is an organization dedicated to seeking to persuasively present Biblical principles in the centers of influence on issues affecting the family through research, education, communications and networking.

INDIVIDUAL UNITED STATES CITIZENS: Cathy Fitzgerald, Daniel S. Hahn, Lawrence Spicher, Mark Cooper, Natisha Cooper, Lana Loza, Janice Walker, Evelyn Bradley, Marjorie Silveira.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF FACTS & PROCEDURE	3
ARGUMENT	3
I. THE NINTH CIRCUIT RELIED ON AN INCORRECT VIEW OF THE PURPORTED "WALL OF SEPARATION" BETWEEN CHURCH AND STATE	3
II. *MARSH v. CHAMBERS*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983) IS CONTROLLING IN THIS CASE	8
III. CALIFORNIA LAW ALLOWS RECITATION OF THE PLEDGE OF ALLEGIANCE AND IS CONTROLLING IN THIS CASE	14
IV. ACADEMIC FREEDOM SUPPORTS RECITATION OF THE PLEDGE OF ALLEGIANCE	16
CONCLUSION	18

TABLE OF AUTHORITIES

U.S. CONSTITUTION — Page

First Amendment ..... *passim*

FEDERAL STATUTES

4 U.S.C. § 4 ..... 7, 8, 14, 16

FEDERAL CASES

Adamian v. Jacobsen, 523 F.2d 929 (1975) 17

Altman v. Minn. Dept. Of Corrections, 251 F.3d 1199 (8th Cir. 2001) 5, 11

Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) 2

Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) 6

County of Allegheny v. American Civil Liberties Union, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) 5

Employment Division v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) 4

Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968) 12, 16, 17

Espinosa v. Rusk, 634 F.2d 477 (10th Cir., 1980) aff'd., 456 U.S. 951 (1982) 6

Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1946) 3, 5

First National Bank v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) 2

Good News Club v. Milford Cent. School, 533 U.S. 98, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001) 13

Holy Trinity Church v. United States, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892) 7

Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967) 16

TABLE OF AUTHORITIES—Continued

Page

Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) 10

Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) 6

Lynch v. Donnelly, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) 13

Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983) 8, 9

Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517 (9th Cir. 1994) 5

Planned Parenthood of Columbia/Willamette, Inc., v. American Coalition of Life Activists, 244 F.3d 1007 (9th Cir. 2001) 1-2

Regents of the University of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) 16

Regents of the University of Michigan v. Ewing, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985) at fn. 12 18

Reynolds v. United States, 98 U.S. 145 (1878) 3

Rhode Island Fed'n of Teachers v. Norberg, 630 F.2d 850 (1st Dist., 1980) 13

Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) 4

School District of Abington Township of Pennsylvania v. Schempp, 374 U.S. 203, 83 S.Ct. 1560 (1963) 5

Tinker v. Des Moines Independent School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) 4, 5, 17

United States v. Ballard, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944) 6

TABLE OF AUTHORITIES—Continued

	Page
Watson v. Jones, 80 U.S. 679, 20 L.Ed. 666 (1871)	16
West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943)	12, 13
Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952)	9
STATE CONSTITUTION	
Calif. Const., art. 1, § 4 (1879)	14, 15
STATE STATUTES	
California Civil Code § 3542	15
California Education Code § 52720	14, 17
STATE CASES	
Citizens *For Parental Rights v. San Mateo County Bd. Of Educ.*, 51 Cal.App.3d 1, 124 Cal.Rptr. 68, *appeal dismissed*, 425 U.S. 908, 96 S.Ct. 1502, 47 L.Ed.2d 759, *rehearing denied*, 425 U.S. 1000, 96 S.Ct. 2217, 48 L.Ed.2d 825 (1975)	12
DaFonte v. UpRight, Inc., 2 Cal.4th 593, 7 Cal.Rptr. 238 (1992)	15
Fellowship of Humanity v. Alameda County, 153 Cal.App.2d 673, 315 P.2d 394 (1957)	9
Gerawan Farming v. Lyons, 24 Cal.4th 468, 101 Cal.Rptr.2d 470, 12 P.3d 720 (2000)	15
Los Angeles Alliance for Survival v. City of Los Angeles, 22 Cal.4th 352, 93 Cal.Rptr.2d 1, 993 P.2d 334 (2000)	15

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES	Page
THE BIBLE, *John* 1:14 (King James)	4
THE BIBLE, *Matthew* 23:18-22 (King James)	18
Riverside Press Enterprise, *Faiths of the World* (3/18/01, Associated Press)	10
Justo L. Gonzalez, *The Story of Christianity*, Vol. 2, (Harper Collins NY, 1985) pp. 59-60, 200-201	18

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI.

INTRODUCTION

Amici Curiae submit this brief in support of Petitioners in this matter. *Amici Curiae* represent a variety of Federal and California State legislators, public interest groups, and others.

This case is one of the most important cases to face this Court in many decades. There is little doubt that this case creates a stark "line in the sand" between opposing politico-legal views about what the concept of "separation of church and state" means. In fact, there is no doubt that the Pledge of Allegiance represents a high form of political speech and does, admittedly, make direct reference to God. Political speech is "given the maximum level of protection by the Free Speech Clause because it lies at the core of the First Amendment." *Planned Parenthood of Columbia/Willamette,*

Inc. v. American Coalition of Life Activists, 244 F.3d 1007, 1019 (9th Cir. 2001). *See also First National Bank v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978); *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). As such, those who recite the Pledge of Allegiance are entitled to protection under the United States Constitution.

This Court can stabilize the law concerning the Pledge of Allegiance. Regardless of the outcome, the citizens of the United States of America will be provided with the security of knowing that the issues were carefully and independently considered by the members of the U.S. Supreme Court.

Amici seek an opinion: A.) That recitation, in public schools, of the Pledge of Allegiance does not offend the exact language of the Establishment Clause of the First Amendment; B.) That there is no excessive entanglement of religion and government in this case; and, C.) That the tradition, history, and patriotism incorporated in the Pledge of Allegiance have a valid place in the public school arena.

To wit, the First Amendment is actually fostered by allowing recitation of the Pledge of Allegiance. By allowing the Pledge of Allegiance to be recited, issues concerning its principles can be better considered and debated. If the Pledge of Allegiance were to be removed from the public school setting, the marketplace of ideas will be unreasonably restricted.

Removal of an impetus for protected First Amendment debate is contrary to the freedoms of speech and expression. By seeking to ban the Pledge of Allegiance, Mr. Newdow seeks an impermissible orthodoxy of secularist principles in America's public schools. The Pledge of Allegiance is simply a tolerable acknowledgment of beliefs widely held among the people of this country. The clause, "under God," does not remotely put the imprimatur of the state on any particular theological thread. In fact, the generic reference to God in the Pledge of Allegiance is completely appropriate in a nation whose institutions presuppose a Supreme Being.

STATEMENT OF FACTS & PROCEDURE

Amici Curiae join the Statement of Facts set forth in the decision of the Ninth Circuit Court of Appeal, 292 F.3d 597, 2002 WL 1370796 (9th Cir.Cal.) at *3.

ARGUMENT

I. THE NINTH CIRCUIT RELIED ON AN INCORRECT VIEW OF THE PURPORTED "WALL OF SEPARATION" BETWEEN CHURCH AND STATE

The notion of "separation of church and state" is one that derives from a statement by Thomas Jefferson in reply to an address by a committee of the Danbury Baptist Association. *See Reynolds v. United States*, 98 U.S. 145, 164 (1878) (citing a recorded statement of Thomas Jefferson where he referred to building a wall of separation between church and state). Jefferson's statement concerning the purpose of the Establishment Clause of the Constitution was first used in association with First Amendment religious liberties and education in *Everson v. Board of Education*, 330 U.S. 1, 16, 67 S.Ct. 504, 91 L.Ed. 711 (1946). In *Everson*, the majority of this Court actually upheld a program that allowed parents to be repaid from state funds for the costs of transportation to private religious schools. *Id.* at 17. This Court only required that the state maintain neutrality in its relations with various groups of religious believers. *Id.* This Court agreed that the State may not establish a church per se. Therefore, the decision in *Everson* does not provide a precedent for those who would remove every vestige of religion from the public forum.

Presumptively, it is a limited notion of the "wall of separation" that actually allows the Arlington National Cemetery to maintain thousands of religious inscriptions on state-owned property, that allows the continued existence of the National Cathedral (which has Christian Scripture incor-

porated into its very walls[1]), the "In God We Trust" motto on American currency, and the many invocations that precede various official proceedings throughout the United States (for example, the opening announcement by the Clerk of this Court itself, "God save this honorable court). The religious views and representations of Americans clearly have a proper place in all aspects of governmental action with its citizenry, as such views are a reflection of the self-created collective identity of the United States citizens. *See generally, Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (allowing expenditure of government funds on religious newspaper).

A priori, one cannot divorce state proceedings from the fact that such proceedings are conducted by individual persons possessing personal rights to freedom of expression, association, and religious practice under the First Amendment to the United States Constitution. After all, under most circumstances, one has the right "to believe and profess whatever religious doctrine one desires" and great protection is afforded to this element of the Constitution. *See, generally, Employment Division v. Smith*, 494 U.S. 872, 876-878, 110 S.Ct. 1595, 1599, 108 L.Ed.2d 876 (1990). Indeed, students and teachers retain their rights to free expression on campus. *Tinker v. Des Moines Ind. Sch. Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969). Accordingly, the Pledge of Allegiance is but one way that individual teachers, students, and others can express their protected views.

Taken to its logical conclusion, Newdow's contention would require this Court to remove every religious inscription

[1] The language of John 1:14, "The Word was made flesh, and dwelt among us . . .," is inscribed in the foundation stone. The stone came from near Bethlehem. The religious significance of the stone and its source is unquestionable. *See*, http://www.cathedral.org/cathedral/discover/history.shtml

at Arlington National Cemetery and the National Cathedral, redact language from the Declaration of Independence, prohibit the singing of the National Anthem (the fourth verse which expressly affirms our trust in God), and destroy every dollar bill that carries the motto of the United States. Indeed, all cities with religious names would have to be renamed under Plaintiff's narrow view of the Constitution. Common sense militates against such a draconian view of the First Amendment. There is simply no way that the First Amendment was intended to eliminate every possible vestige of religion in the halls of government. Indeed, the First Amendment was intended to allow all religions, including theism and atheism, to flourish under the Constitution. *See School District of Abington Township of Pennsylvania v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring); *County of Allegheny v. American Civil Liberties Union*, 109 S.Ct. 3086, 3135, (1989) (Kennedy, J., concurring in part and dissenting in part).

The First Amendment does not, on its face, suggest that those who would engage in religious speech must leave their Constitutional protection at the schoolhouse steps. *Tinker*, 393 U.S. at 506 (1969). In fact, religious reference may be made an objective part of an academic curriculum. *See, generally, Schempp*, 374 U.S. at 294. The only relevant limitation on the rights of teachers or administrators is that they not proselytize students. *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th.Cir. 1993); *Everson*, 330 U.S. 1 (1947). Given the above principles of law, it is not a substantial burden on Mr. Newdow's daughter that she should be "exposed to widely-accepted views" which she herself is said to support. *Altman v. Minn. Dept. of Corrections*, 251 F.3d 1199, 1204 (8th.Cir. 2001). (*See also* Fn. 3 herein). The voluntary Pledge of Allegiance does not proselytize or substantially burden anyone such that one could conclude that religion is being forced onto unwilling persons.

Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) sets forth the test for whether or not the Establishment Clause of the First Amendment has been violated. One must consider each of the following factors:

A. Whether the state action has a secular purpose[2];

B. Whether the principal or primary effect is one that neither advances nor inhibits religion;[3]

C. Whether the state action fosters an *excessive* entanglement with religion.[4]

The "entanglement" element, and other elements of the *Lemon* test, cannot be viewed in the myopic manner chosen

[2] This element must be weighed against the holdings of *Espinosa v. Rusk*, 634 F2d 477 (10th.Cir., 1980), *aff'd.*, 456 U.S. 951 (1982). *Espinosa* held that it is unconstitutional for a state to test, per se, whether a cause is religious or secular. In other words, the State should not be engaging in some type of speculative determination of whether the Pledge of Allegiance, as a pragmatic matter, constitutes a religious expression versus a distinctive historical/patriotic statement. *See also Cantwell v. Connecticut*, 310 U.S. 296, 301, 60 S.Ct. 900, 84 L.Ed. 1213 (1943); *United States v. Ballard*, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944).

[3] There is certainly no proof in the record below that recitation of the Pledge of Allegiance has somehow converted any students to a Judeo-Christian worldview. Nor is there any evidence that the Pledge of Allegiance has somehow inhibited any student or school staff member from becoming a member of any religious class of persons. Without pleading such proof, Newdow has failed to meet the evidentiary burden contemplated by the *Lemon* test. *Lemon* 403 U.S. at 612-613.

[4] Since there is no proof that the Pledge of Allegiance has caused or inhibited the conversion of persons to a monotheistic worldview, 'entanglement' is *a priori* precluded as a possibility in this case. There can be no entanglement where no causal nexus between the challenged activity and some cognizable harm can be established. In fact, it has been reported in the news media that Newdow's daughter is of a Judeo-Christian worldview. As such, there could not have been any harm in her voluntary participation in Pledge of Allegiance activities. *See*, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=28160

by Newdow. Congress has established no identifiable law requiring any mandatory recitation of the Pledge of Allegiance, or portion thereof. 4 U.S.C. § 4. As can be seen from the plain language of the Establishment Clause, the State is only prohibited from making law "respecting the establishment of religion." The Pledge of Allegiance neither supports nor inhibits any particular exercise or belief in a religion. It certainly does not rise to the call of establishing any identifiable religion, including atheism.

However, even if the Pledge of Allegiance maintains a religious tone, this nation's inextricable connection to religion is undeniable. *Holy Trinity Church v. United States*, 143 U.S. 457, 458, 12 S.Ct. 511, 36 L.Ed. 226 (1892). Indeed, the documents that form the basis for the founding of our nation[5], the Constitution, and our present form of government plainly reveal that a theistic view of the world led to the notions that are now considered to be the most sacrosanct in this nation's worldview. The Pledge of Allegiance is a proper statement of America's national identity. Particularly, the ideas of equality, a triune government, and moral accountability for crimes all derive from religious views of the world. Indeed, morality itself is not a purely atomistic stance on humanity, as suggested by the secular-atheistic orthodoxy sought to be imposed by Mr. Newdow upon this nation.

The recitation of the Pledge of Allegiance is a very individuated activity. It is only meaningful to the extent that it is actually uttered by some individual person. The recitation of the Pledge of Allegiance is no different than every willing person announcing, of his or her volition, that they are Atheist, Christian, Buddhist, or Universalist. Certainly, Plaintiff could have no reasonable objection to

[5] One cannot escape the unequivocal references to "Nature's God" and the "Creator" in the Declaration of Independence.

allowing a Free Speech zone on campuses that allows one, or a group of persons, to talk about what they believe.

The Pledge of Allegiance itself cannot be said to be inherently contrary to the Constitution, as it only matters if someone is actually required to recite it. The Pledge of Allegiance, standing alone as 4 U.S.C. § 4, is no more coercive than the often ignored inscriptions at the National Cathedral. If Plaintiff has a problem with those individuals who may choose to say the Pledge of Allegiance, then he is misguided. Each individual who chooses to recite the Pledge of Allegiance is only expressing his or her protected beliefs. Such an expression of beliefs should not be overrun by this Court, which is a state entity itself. Those who would recite the Pledge of Allegiance should be just as protected against the state as Mr. Newdow. The Ninth Circuit opinion in this case is a prior restraint.

Ironically, if Mr. Newdow's position were to be adopted, the Court would be violating its own admonition against establishment of a normative stance in matters of ethics, values, and beliefs. *Newdow*, 292 F.3d 597, 2002 WL 1370796 at *9. Mr. Newdow's position allows only a blanket prohibition against the Pledge of Allegiance, and does not allow for a diversity of ideas or alternative expressive channels to be made available to those who recite the Pledge of Allegiance.

II. *MARSH v. CHAMBERS*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983) IS CONTROLLING IN THIS CASE

In *Marsh v. Chambers*, this Court recognized that:

> "In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313, 72 S.Ct. 679, 684, 96 L.Ed. 954 (1952).

Marsh v. Chambers, 463 U.S. at 792.

As the three-judge panel in this case noted, "The Supreme Court applied the *Lemon* test to every Establishment case it decided between 1971 and 1984, with the exception of *Marsh v. Chambers* . . . the case upholding legislative prayer." *Newdow*, at *7. It is the position of *Amici Curiae* that the reason for the Court's failure to apply the *Lemon* test is that the Pledge of Allegiance, legislative prayer, and other traditional invocations, are different kinds of activities than those that give rise to the establishment or endorsement of some particular religious view.

The 20-30 second time period that it takes to say the Pledge of Allegiance, or to hear others reciting it, hardly rises to the level of a purely "religious activity." Moreover, the previous 49 years of the Pledge of Allegiance's existence, with the "under God" phrase, can be said to have become a thread in the fabric of American society, similar to the Declaration of Independence, the National Cathedral, Arlington National Cemetery, the National Anthem, and daily legislative prayers. The national furor over the decision in the instant case is a testimony to the strength of this particular thread.

Moreover, recitation of the Pledge of Allegiance is simply not a "religious ceremony" within the meaning of the law. *Fellowship of Humanity v. Alameda County*, 153 Cal.App.2d 673, 315 P.2d 394 (1957) (religion as being related to prayers, specific homage, worship, etc.). The reference to "God" in the Pledge of Allegiance does not, in any way,

convey any meaningful information about the exact nature of God or purport to resolve any particular theological debate about the existence of God. The Pledge of Allegiance does not rise to the level of instituting a set view of the universe, that is "established" or "endorsed" by the State, which amounts to a sectarian byproduct that might otherwise be the result of thousands of years of theological debate amongst various religious adherents in the world. The Pledge of Allegiance cannot be compared to something as ceremonious as a Catholic Mass, Islamic pilgrimage to Mecca, or any other clearly religious "ceremony." Such ceremonies are clearly intended to convey something about the perceived nature of God and humankind's duty toward God.

While one could argue abstractly that an individually or personally crafted prayer, as in *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), could create an ability to identify and segregate a particular theological thread, one cannot say that the phrase "under God" conveys any particularized theological view. At most it represents a very generic view of what 84.2% of North Americans believe. *See* Riverside Press Enterprise, *Faiths of the World* (3/18/01, Associated Press) (statistics demonstrating that 84.2% of North Americans subscribe to Judeo-Christian religious principles (i.e., monotheism)).

Incredibly, however, the Ninth Circuit Court of Appeal has suggested that the Pledge of Allegiance "impermissibly takes a position with respect to the purely religious question of the existence and identity of God." *Newdow* 292 F.3d 597, 2002 WL 1370796 at *8. Common sense dictates that this can hardly be the case since there remains diverse and lively theological debate over exactly those issues, even among those who profess a faith in a monotheistic view.[6] Forty-nine

[6] For example, there has been historical debate over the existence of a triune God (Father, Son, Holy Spirit) versus an indivisible, undifferentiated, undivided, and/or unified concept of God. The Pledge of Allegiance obviously makes no attempt to distinguish between Catholic, Mormon, Protestant, or other views of God by theologians or philosophers. Contrary to the opinion herein, the Pledge of Allegiance simply cannot be said to endorse any distinguishable view of "God." As such, the Pledge of Allegiance is neutral toward any *religion*. Whether or not atheism is a religion is open to debate. If, arguably, atheism incorporates the belief that there is no valid religion or God, there can be no harm to Newdow.

years of the "under God" language of the Pledge of Allegiance has hardly promoted a uniform view of religion. If anything, the United States is much more diverse now than it was in 1954, when the current version of the Pledge of Allegiance was adopted. The fact that Respondent's daughter is exposed to a recitation of what the majority of Americans might believe is of no constitutional offense.

In analyzing an analogous situation, the Eighth Circuit Court of Appeals noted that being "exposed to widely-accepted views that they oppose on faith-based principles" (i.e., Christian *or* atheistic views) cannot be the basis of a civil rights claim. *Altman*, 251 F.3d at 1204. The court went on to specifically say that, "This is not, in our view, a substantial burden on their free exercise of religion." *Id.*

In *Altman*, Christian employees were required to sit through a "seventy-five minute training program" involving homosexuality and other topics that they morally opposed. *Id.* at 1201. The program was state-operated. *Id.* In an attempt to avoid the effect of the program, the Christian state-employees chose to read their Bibles during the presentation. *Id.* They were reprimanded for doing so and claimed that their religious freedoms had been violated by the mandatory participation in the training program and the inability to opt out of the program. *Id.* at 1203-04. Much like Mr. Newdow, the plaintiffs in *Altman* claimed that the coercive environment of the program constituted a constitutional violation. *Id.* at 1204. The Eighth Circuit disagreed. *Id.*

If a state-sponsored seventy-five minute presentation that flew in the face of Christian views did not constitute actionable conduct, one cannot seriously claim that recitation of the Pledge of Allegiance can be an actionable offense to Newdow's daughter, or to anyone else who might hear it. The reality of the situation is that Newdow, or his daughter, can simply opt-out of participation in the Pledge of Allegiance. *Newdow* at *9.

It is harmless that Newdow might have to accept that not all others think like he does on matters of political or theological substance. A similar conclusion was upheld in *Citizens For Parental Rights v. San Mateo County Bd. of Educ.*, 51 Cal.App.3d 1, 124 Cal.Rptr. 68, *appeal dismissed*, 425 U.S. 908, 96 S.Ct. 1502, 47 L.Ed.2d 759, *rehearing denied*, 425 U.S. 1000, 96 S.Ct. 2217, 48 L.Ed.2d 825 (1975), wherein the courts held that a school could not be enjoined from providing sex education because parents' religious beliefs were offended.

To be blunt, Newdow's attempt to silence the ostensible views of a majority of Americans is no less egregious than any offense of which he accuses the defendants. Every time a student who believes in Creationism is faced with a teacher who instructs on Evolution Theory, the same constitutional dynamic surfaces. *Epperson*, infra. Time and again, our Courts have been quick to point out that the states' adoption of a secular-evolutionist view of the universe is not a violation of the Establishment Clause. *Epperson*, infra.

If this Court engages in an unqualified adoption of Newdow's desire to rid the world of all public vestiges of religion, it will have violated its own admonition against prescribing what "shall be orthodox in politics, nationalism, religion, or other matters of opinion". *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

Presently, because students can opt out of reciting the Pledge of Allegiance under *Barnette*, no orthodox view of what is politically correct is established, as there can be more than one way of celebrating freedom in our public schools on a daily basis (i.e., reciting the Pledge of Allegiance or opting out). Because of this, those who support Newdow are given the fullest opportunity as members of the "political community." But, by prohibiting others from reciting the Pledge of Allegiance, Newdow is given the favoritism criticized in *Lynch v. Donnelly*, 465 U.S. 668, 688, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984). Newdow is unabashedly atheistic. The decision of the Ninth Circuit Court of Appeal gives his view a prevailing priority over the views of others, even though atheism or secularism can be characterized as being "religions." *See, generally, Rhode Island Fed'n of Teachers v. Norberg*, 630 F.2d 850, 854 (1st.Dist., 1980).

Thus, if Newdow prevails, the *absence* of the Pledge of Allegiance becomes unequivocally orthodox, and violates the freedom of all those who wish to affirm its principles. Nothing could be more insulting to the promise and spirit of the First Amendment. "Given the age and the impressionability of schoolchildren . . . within the confined environment of the classroom", the elimination of the Pledge of Allegiance is just as likely to convey a message of hostility and disenfranchisement of those that support it. *See Newdow*, 2002 WL 1370796 at *11.

Sadly, Newdow's position smacks of the religious intolerance mentioned in *Good News Club v. Milford Cent. School*, 533 U.S. 98, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001). Specifically, this Court stated that:

> "Finally, even if we were to inquire into the minds of schoolchildren in this case, we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger they would perceive a hostility toward the religious viewpoint if the

> [Good News] Club were excluded from the public forum. . . . There are countervailing constitutional concerns related to the rights of other individuals in the community."

Id., 533 U.S. at 118.

As such, the argument that the Pledge of Allegiance creates a necessarily coercive effect has no merit. The very face of 4 U.S.C. § 4 has no mandatory language. It merely states what the "Pledge of Allegiance" is and what persons "should" do during its recitation. It also defies reason to suggest that 4 U.S.C. § 4 has some nefarious religious purpose, as the Pledge of Allegiance need not be said by any student, teacher, administrator, or any other person. Any purpose to the Pledge of Allegiance can only be identified on an individualized basis by looking at the reasons for a particular school's decision to use it to comply with *California Education Code* § 52720 (requiring "appropriate patriotic exercises" in all public elementary and secondary schools in California). This is a matter that is properly left to the academic discretion of local school officials and individual liberty of conscience.

III. CALIFORNIA LAW ALLOWS RECITATION OF THE PLEDGE OF ALLEGIANCE AND IS CONTROLLING IN THIS CASE

Article 1, Section 4, of the California Constitution states, in pertinent part, as follows:

> "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion. . . ."

CALIF. CONST., art. 1, § 4 (1879)

For better or worse, there is no significant case law on exactly what "this liberty of conscience" means within the State of California. However, under California substantive law, to determine what a statute means, "we first consult the words themselves, giving them their usual and ordinary meaning." *DaFonte v. UpRight, Inc.*, 2 Cal.App.4th 593, 601 (1992). One is further instructed by *California Civil Code* § 3542 that "[i]nterpretation must be reasonable."

What is established is that the California Constitution provides more protection to freedom of expression than the United States Constitution. *Los Angeles Alliance for Survival v. City of Los Angeles*, 22 Cal.4th 352, 366, 93 Cal.Rptr.2d 1, 10, 993 P.2d 334 (2000) (citing ten California cases supporting this interpretation); *see, also, Gerawan Farming v. Lyons*, 24 Cal.4th 468, 491, 509, 101 Cal.Rptr.2d 470, 486, 499, 12 P.3d 720 (2000). Indeed, California's Constitution provides a freedom of speech that runs "against the world, including private parties as well as governmental actors". Supra, 24 Cal.4th at 492.

In the instant case, there is no indicia that recitation of the Pledge of Allegiance has the effect of promoting licentious behavior or placing the public at risk of physical or emotional harm. If anything, the laws concerning the Pledge of Allegiance promote reasonable patriotism, unity, mild nationalism, and an invaluable opportunity to open the doors to intellectual discussion and debate about the substance of the Pledge. While Newdow's radical interpretation of federal law might support a weak argument for banning the Pledge of Allegiance, no interpretation of the California Constitution has ever leaned in favor of eliminating such important political speech. *See* CALIF. CONST., art. 1, § 4 (1879).

IV. ACADEMIC FREEDOM SUPPORTS RECITATION OF THE PLEDGE OF ALLEGIANCE

Academic freedom "long has been viewed as a special concern of the First Amendment." *Regents of the University of California v. Bakke*, 438 U.S. 265, 312, 98 S.Ct. 2733, 2759, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.). In fact, this Court has indicated a strong willingness to maintain a watchful eye over any potential challenges to academic freedom. *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968). After all, "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Id.*, 393 U.S. at 105 (citing *Watson v. Jones*, 13 Wall. 679, 20 L.Ed. 666, 1871). "Judicial interposition in the operation of the public school system of the nation raises problems requiring care and restraint." *Epperson*, 393 U.S. at 105.

Here, there is little doubt that Plaintiff asserts that the Pledge of Allegiance is a heresy against the First Amendment to the United States Constitution and his religious atheistic view. Indeed, it is axiomatic, in Plaintiff's world, that religion can have absolutely no place in the public forum. Newdow does not leave room for religious diversity, or the possibility that others, including a majority of students and teachers, might want to express their views in as meaningful a way as he has by bringing this case. Plaintiff's attitudes and claims constitute the very definiens of the term "dogma." In contravention to Plaintiff's dogmatic approach to the First Amendment, "the First Amendment does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967).

The decision of the Ninth Circuit Court of Appeal establishes an orthodoxy that says that the language of 4 U.S.C. § 4 shall never be recited in any publicly funded classroom. "There is no doubt that the First Amendment does

not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." *Epperson*, 393 U.S. at 106. Presumably, this includes the atheistic and secularistic dogma used in Newdow's interpretation of the First Amendment. Banning the Pledge of Allegiance certainly fosters and aids Mr. Newdow's two dogmas (atheism and secularism). *Id.*, at 106-07, 113 (Black, J., concurring) (questioning whether "forbidding a State to exclude the subject of evolution from its schools infringes on the religious freedom of those who consider evolution anti-religious.").

Academic freedom has been held to protect the teaching of evolution (regardless of opposition). *Epperson*, 393 U.S. at 113. If instruction on evolution can be held to be neutral toward religion, the Pledge of Allegiance should be more than safe from Mr. Newdow's attacks. Each of the students and school staff involved in reciting the Pledge of Allegiance has a right of academic freedom. This right protects the Pledge of Allegiance. Specifically, it has been stated that:

> "The desire to maintain a sedate academic environment, "to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," is not an interest sufficiently compelling, however, to justify limitations on a teacher's freedom to express himself on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms."

Adamian v. Jacobsen, 523 F.2d 929, 934 (1975) (citing *Tinker* at 393 U.S. 509).

Here, the State of California has allowed individual schools or districts to determine the specific activities that they wish to utilize to fulfill their individual obligations under *California Education Code* § 52720. As such, individual schools and their staffs have been given some power over the determination of how to define the marketplace of ideas that will meet the obligation to engage in "appropriate patriotic

exercises." The discretion left to individual school sites is as close to the core of academic freedom as possible. *See, generally, Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985) at fn. 12 (academic freedom includes the exchange of ideas, and decision making concerning the autonomy of the institution).

In the present instance, there is no harm in a school district's academic decision to provide a limited forum for the purpose of expressing one's belief in the Pledge of Allegiance. By allowing those who do not wish to participate the option of not reciting the Pledge of Allegiance, the State has insured "neutrality" toward atheists, secularists, and others[7].

CONCLUSION

For the foregoing reasons, the Honorable Court should reverse the judgment of the Ninth Circuit Court of Appeals herein.

Respectfully submitted,

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[7] This list could just as easily include orthodox Quakers (Society of Friends) or Anabaptists who oppose[d] oaths. See, Justo L. Gonzalez, *The Story of Christianity*, Vol. 2, (Harper Collins NY, 1985) pp. 59-60, 200-201. Also, see, Matthew 23:18-22 [prohibition against swearing] (King James version). Obviously, there is a diversity of ideas about pledges and oaths, even among Christians.